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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-183088

DATE: March 23, 1977

MATTER OF: Reconsideration of Everett Turner and David L. Caldwell - Retroactive Temporary Promotions for Extended Details to Higher Grades

DIGEST: Turner-Caldwell, 55 Comp. Gen. 539 (1975), allowed retroactive temporary promotions with backpay for employees improperly detailed to higher grade positions for extended periods. The Civil Service Commission requested a review of this decision. On reconsideration, we find the interpretation proper and affirm Turner-Caldwell and Marie Grant, 55 Comp. Gen. 785 (1978).

This action involves a reconsideration of In the Matter of Everett Turner and David L. Caldwell - Retroactive Temporary Promotions for Extended Details to Higher Grades, B-183088, December 5, 1975, 55 Comp. Gen. 539. That decision held that employees detailed to higher grade positions for more than 120 days, without Civil Service Commission (CSC) approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. The Civil Service Commission's Board of Appeals and Review (now Appeals Review Board) in the Matter of David L. Caldwell and Everett Turner, April 19, 1974, had similarly construed the provisions of subchapter 8, chapter 300 of the Federal Personnel Manual (FPM), as entitling the two employees to retroactive temporary promotions for extended details to higher grade positions where the agency had not obtained approval from the Civil Service Commission to extend the details beyond 120 days.

The facts are fully stated in the Board's decision and our earlier decision and are only briefly restated here. Mr. Turner's official position in the Bureau of Mines, Department of Interior, was that of Deputy Assessment Officer, grade GS-14. As required by his position description, he served as "Acting" Assessment Officer, grade GS-15, for more than 26 months while that position was vacant. Mr. Caldwell's official position was Assistant Assessment Officer, grade GS-13 and he served as "Acting" Deputy Assessment Officer (GS-14) for more than 15 months. Both of these assignments were reflected in internal memoranda of the Bureau of Mines, but neither was formalized in an official personnel record. When another employee was designated as "Acting" Assessment Officer, Turner and Caldwell resumed their official positions and filed a grievance alleging a reduction in rank.

**PUBLISHED DECISION
55 Comp. Gen.**

B-183086

On appeal by the two employees from a dismissal by the Commission's Appeals Examining Office, the Board of Appeals and Review found that the agency had no discretion to continue the two details beyond 120 days without CSC's approval and, consequently, had violated the Civil Service Commission's Federal Personnel Manual requirements for such details. It, therefore, ordered the agency to grant temporary retroactive promotions to Turner and Caldwell for the periods of their details lasting beyond 120 days. The two employees filed claims with this Office for backpay. We adopted the Board's interpretation and allowed the claims, overruling 52 Comp. Gen. 920 (1973), 55 Comp. Gen. 539, supra.

Subsequently, in Marie Grant, B-184990, February 20, 1976, 55 Comp. Gen. 785, we ruled that the Turner-Caldwell decision applied retroactively to extended details to higher grade positions, subject only to the time limitation on filing claims imposed by 31 U.S. Code § 71a.

The General Counsel of the Civil Service Commission has now urged us to reverse our decision. In a letter to this Office dated November 2, 1976, the General Counsel stated as follows:

"* * * The award of back pay to Turner and Caldwell was presumably premised upon the assumption that the employing agency (Department of the Interior, Bureau of Mines) was absolutely required temporarily to promote them on the 121st day of their details. That is, the premise set forth by the Board decision and adopted by the Comptroller General is that the agency has a nondiscretionary duty to promote on the 121st day and the failure to do so amounts to an unwarranted and unjustified personnel action.

"We have thoroughly reviewed this matter with the pertinent Commission offices and bureaus, however, and have concluded that the Board incorrectly interpreted subparagraphs 8-4(e) and 8-4(f) of subchapter 8, chapter 300 of the FPM. It simply is not Commission policy to mandate temporary promotions in cases of agencies

B-183088

extending details beyond 120 days without Commission approval. Rather, the Commission's interpretation of the pertinent provisions is, as it has been for many years, that the granting of temporary promotions even in overlong detail situations is essentially left to the discretion of the agency.

"To be sure, agencies may abuse that discretion by continuing employees in details to higher graded positions for too long a period. And, in some such cases a proper corrective action could be a temporary promotion for the employees involved; that promotion, however, would be prospective only. In short, the Board action in ordering retroactive temporary promotions for Turner and Caldwell incorrectly departed from the Commission's view of the meaning of chapter 300 of the FPM. (Emphasis in original)

"Notwithstanding the above, in our judgment, the fact that more than two years has elapsed since the decision in the Turner/Caldwell cases, would make it inappropriate to ask the Civil Service Commissioners to reopen that particular decision under the procedures set forth at 5 C. F. R. §772.312(a). * * *"

The Executive Director of the Civil Service Commission in a letter dated March 8, 1977, has also expressed the concern of the Commission over the back pay issue, particularly where super grades are involved and where the Whitten amendment would come into play. The Executive Director also raises questions concerning certain practical problems which may result from requiring agencies to pay the extra costs of the higher grades where employees are performing the duties of higher grade positions without complying with the provisions of the Federal Personnel Manual.

In the light of these comments we have reexamined the matter. While we recognize that a basis exists for the views stated on behalf of the Commission, those views do not affect our reading of subchapter 8, chapter 300, of the Federal Personnel Manual to the effect

B-183086

that, for purposes of backpay, it imposes a nondiscretionary duty upon an agency either to seek the Commission's approval to extend a detail to a higher grade position beyond 120 days, or to promote the detailed employee for a temporary period after the first 120 days. Paragraph 8-3b(2) of the subchapter flatly limits all details to 120 days unless prior approval of CSC is obtained, and it states that higher grade details will be confined to the initial 120 days, plus one extension for a maximum of 120 more days. Paragraph 8-4f(1) states that for a detail of over 120 days an agency must obtain prior CSC approval. Under paragraph 8-4f(4), "if the detail is to a higher grade position, the Commission will approve only one extension of up to 120 days, for a total of 240 days." Also, paragraph 4-1e(2) of FPM chapter 335, subchapter 4 "Promotion Procedures," reaffirms that employees should not be detailed to higher grade work, except for brief periods, and that normally an employee should be given a temporary promotion instead. In summary, detailing employees for extensive periods without Commission approval or temporary promotions circumvents the checks and balances of the system and is not conducive to sound personnel management.

Indeed, we find additional support for this construction of the Federal Personnel Manual in 5 U.S.C. § 3341 (1970) which governs employee details within Executive and military departments. This statute clearly indicates the intent of the Congress to limit agency discretion in detailing employees to brief periods of time by providing that: "Details * * * may be made only by written order of the head of the department, and may be for not more than 120 days." In particular cases, as an exception to the stated time restriction, the statute permits details to be extended for periods not exceeding 120 days, but only upon written order of the head of the department, which insures review of each detail and its justification. There is no discretion beyond that authorized by the statute.

We do not believe that the statutory provision and the provisions in the FPM covering details, which specifically state certain procedures which are to be followed to protect employees should be construed to leave the employee without a remedy in the event the agency decides to ignore, or inadvertently does not follow, the requirements of the statute or the FPM.

Subsequent to our ruling in Turner-Caldwell, the U. S. Supreme Court on March 2, 1976, decided United States v. Testan, 424 U. S. 392 (1976). The Testan case involved the issue of entitlement of

B-183086

backpay for errors in position classification levels. The Supreme Court held that " * * * neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications." 424 U.S. at 407.

The decisions of this Office are consistent with the Testan holding that classification actions upgrading a position may not be made retroactive so as to entitle the incumbents to backpay. Despite dictum to the effect that entitlement to backpay can be founded only upon wrongful withdrawal of pay, we view the Testan case as limited to the issue of improper classification.

We have previously held that Testan does not preclude retroactive correction of unjustified and unwarranted personnel actions, whether they be acts of commission or failures to act, where the agency has failed to carry out a nondiscretionary regulation or policy. See, for example, 55 Comp. Gen. 1311 (1976); B-180010, August 30, 1976, and 55 Comp. Gen. 1443 (1975).

We are aware that our decision in Turner-Caldwell differs with the rationale expressed in Peters v. United States, 208 Ct. Cl. 373, decided on December 17, 1976, 12 days after our decision was issued on December 5, 1975. Although the factual situation in the Peters case is somewhat similar to the situation in Turner-Caldwell, it is apparent from the Peters decision that the Court of Claims was not informed that the Board of Appeals and Review had interpreted the Civil Service Commission's employee detail provisions as requiring mandatory temporary promotions under certain conditions and that this Office had concurred in that interpretation. Hence we do not feel compelled to follow Peters. See Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970); 20 Am. Jur. 2d Courts § 193 (1965); 21 C.J.S. Courts § 186(c) (1940).

Accordingly, we adhere to the view that under the detail provisions of the FPM, an agency head's discretion to make a detail to a higher grade position lasts no longer than 120 days, unless proper administrative procedures for extending the detail are followed. We further affirm that a violation of these provisions is an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (1970), for which the corrective action is a retroactive temporary promotion and backpay, as set forth in our decision 55 Comp. Gen. 539, supra. It is necessary, however, that the employee satisfy the requirements for a retroactive temporary promotion.

B-183086

In this connection, certain statutory and regulatory requirements could affect the entitlements of an employee otherwise qualified for corrective action as a result of an improper extended detail. For example, an employee improperly detailed for an extended period, who fails to meet the time in grade requirements of the "Whitten Amendment," 5 U. S. C. § 3101, note, would not become entitled to a retroactive temporary promotion until such time in grade requirements were satisfied. See 55 Comp. Gen. 539, 543. Similarly, an employee improperly detailed to a grade GS-16, 17 or 18 position for an extended period would not be entitled to a retroactive temporary promotion unless the provisions of 5 U. S. C. § 3324 governing appointments to such supergrade positions had been complied with. See our decision B-186084 of today.

This decision only provides an entitlement to a temporary promotion to employees improperly detailed for extended periods and should not be construed as providing an entitlement to a permanent promotion.

Accordingly, on reconsideration, we affirm our holdings in Turner-Caldwell and Marie Grant.

Thomas B. Stacks

Comptroller General
of the United States



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WASHINGTON, D.C. 20548

B-183086

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TO THE HEADS OF DEPARTMENTS, INDEPENDENT ESTABLISHMENTS,
AND AUTHORIZED CERTIFYING AND DISBURSING OFFICERS

Subject: Settlement of Federal Employees Claims for Backpay
Resulting from Improper Details

Attached is a copy of our decision of today, B-183086, in the Matter of Reconsideration of Everett Turner and David L. Caldwell--Retroactive Temporary Promotions for Extended Details to Higher Grades, that affirms our original Turner-Caldwell decision, 55 Comp. Gen. 539 (1975), which holds that employees improperly detailed to higher grade positions for extended periods without an approved extension are entitled to retroactive temporary promotions and backpay from the 121st day of such details. Today's decision also affirms Marie Grant, 55 Comp. Gen. 785 (1975), which held that Turner-Caldwell was applicable on a retroactive basis subject to the statute of limitations.

Employees' claims for backpay incident to such improper details that satisfy the criteria set forth in Turner-Caldwell may be settled by agencies and departments without referring them to this Office. However, where doubt exists that a claim satisfies the criteria, the claim should be referred to our Claims Division, pursuant to 4 C. F. R., Part 31.

Comptroller General
of the United States

Attachment